No. 99-830

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IN THE

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

—v.—

LEROY CARHART, M.D.,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ELIOT SPITZER
Attorney General of the
State of New York
Preeta D. Bansal
Solicitor General
Counsel of Record
Jennifer K. Brown
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 416-8020

Attorneys for the State of New York

(Counsel continued on inside cover)

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HON. ANDREW KETTERER
Attorney General of Maine
State House Station Six
Augusta, Maine 04333

HON. HARDY MYERS
Attorney General of Oregon
Justice Building
1162 Court Street NE
Salem, Oregon 97310

HON. WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

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The State of New York, joined by the States of Maine, Oregon and Vermont, respectfully submits this *amici curiae* brief urging affirmance of the decision below.

STATEMENT OF INTEREST OF AMICI CURIAE

As the chief legal officers of their states, *amici* have a direct interest in the continued vitality of the framework created by *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), for balancing women's rights and state interests with respect to abortion. *Amici* share an abiding respect for the judiciary's constitutional role in securing that balance and protecting these fundamental rights.

Amici have found that the balance reached in *Roe* and *Casey* accords to states the necessary authority to regulate abortion in the genuine interest of promoting health and preserving potential life while fully respecting the fundamental privacy and liberty rights of women. Allowing abortion regulations that do not serve these weighty state interests would invite endless legislative and judicial battles and would gravely undermine the unique liberty and health interests that are at stake for women.

Amici have a strong interest, as well, in resisting an approach to statutory construction, urged upon this Court by petitioners and other state *amici*, that would permit a federal court to enjoin a state statute's operation without declaring the statute unconstitutional. This novel and untested approach would, if adopted, subject state officers to contempt proceedings for disagreeing with a court's statutory interpretation, permitting unprecedented federal intrusion into state sovereignty in the administration of state laws.

SUMMARY OF ARGUMENT

The Eighth Circuit's rejection of the Nebraska abortion ban was based on sound statutory construction. The evidentiary record demonstrates beyond doubt that the ban encompasses the dilation and evacuation abortion procedure, thereby unduly burdening access to second-trimester abortion. Petitioners' arguments for a different statutory construction are unavailing: an attorney general's statutory interpretation cannot bind a state; the legislative history does not require a different interpretation; and it is beyond a court's power to rewrite a statute to save its constitutionality.

Petitioners' proffered alternative -- the issuance of "precautionary injunctions" as used by the Seventh Circuit to save similar statutes in *Hope Clinic v. Ryan* -- is an utterly untested means of attempting to conform state enactments to constitutional requirements. This mechanism would subject state officials to contempt charges for enforcing statutes that have not been held invalid, if the officials' statutory interpretation differed from that of a federal court. The approach in *Hope Clinic* endorsed by petitioners, while couched as an exercise in judicial restraint, in fact represents a dangerous and unprecedented incursion by federal courts into state lawmaking that this Court should firmly reject.

The Eighth Circuit's invalidation of the Nebraska statute should be affirmed for another reason, as well. Since *Roe v. Wade*, this Court's abortion jurisprudence has rested on twin principles: first, the Constitution protects a woman's right to decide whether to terminate

her pregnancy by abortion; second, states may regulate abortion to serve their weighty interests in protecting women's health or promoting potential life. The Court's 1992 decision in *Planned Parenthood v. Casey* reaffirmed these principles, and held that abortion restrictions that apply before fetal viability must not unduly burden the woman's ability to obtain an abortion. The Nebraska statute that is now before the Court does not serve either of these state interests and therefore should be rejected.

To permit abortion regulations that do not serve these recognized, substantial state interests would be to devalue the status of the women's liberty and health interests that were recognized in *Roe* and *Casey*. What is more, such permission would invite countless legislative enactments, miring state governments in endless battles while promoting increasing uncertainty about the scope of this constitutional right.

ARGUMENT

I. THE EIGHTH CIRCUIT'S CONSTRUCTION OF THE ABORTION BAN IS CONSTITUTIONALLY SOUND, AND SHOULD NOT BE REJECTED IN FAVOR OF THE SEVENTH CIRCUIT'S APPROACH IN *HOPE CLINIC V. RYAN*

The Eighth Circuit struck down a Nebraska statute that creates criminal penalties for what it refers to as "partial-birth abortion." *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999); *see* Neb. Rev. Stat. § 28-328. The statute prohibits abortions within its definition at any stage of pregnancy, both before and after viability. This litigation is solely concerned with its application before viability. *Carhart*, 192 F.3d at 1148 n.10.

The Eighth Circuit held that this statute bans not only the dilation and extraction ("D&X") abortion procedure, but also the dilation and evacuation ("D&E") procedure. *Id.* at 1150. Because D&E is the usual procedure for abortions during the second trimester, the court below concluded that a statute banning that procedure unduly burdens the woman's choice to terminate her pregnancy before viability and is therefore unconstitutional under *Casey*. *Id.* at 1151.

Petitioners do not take issue with the conclusion, reached below, that a ban on D&E abortions would be unconstitutional. Rather, petitioners urge this Court to reject the Eighth Circuit's construction of the Nebraska statute as reaching both D&X and D&E abortions, and instead to adopt the Seventh Circuit's approach which

gave a "saving" construction to the similarly worded Wisconsin and Illinois abortion bans in *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999). (Pet. for *Cert.*, Question 1). *Amici* submit that the Eighth Circuit's approach to statutory construction was sound, and that the Seventh Circuit's approach, endorsed by petitioners, poses a significant risk to states' autonomy and principles of federalism.

A. The Courts Below Followed Established Canons of Statutory Construction

The evidence in this case required the courts below to hold that the Nebraska ban reaches D&E abortions. Petitioners fault this holding on several grounds, including: first, that the Nebraska Attorney General disavowed any intent to apply the statute to D&E abortions; second, that the language and legislative history of the statute as read by petitioners demonstrate an intent to criminalize only D&X abortions; and third, that the court failed to construe the statute in a manner that would save its constitutionality. (Pet. Br. at 11-12).

Regarding petitioners' first point, this Court has recognized that "as the Attorney General does not bind the state courts or local law enforcement authorities, [this Court is] unable to accept [his] interpretation of the law as authoritative." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988); *cf. Baggitt v. Bullitt*, 377 U.S. 360, 373 (1964) ("[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague

law").[1]

As to the text of the statute, "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from that language." *United States v. Albertini*, 472 U.S. 675, 680 (1985) (citations omitted). Here, the statute bans "partial-birth abortion," defined as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. § 28-326(9). The court of appeals, citing the extensive evidentiary record before the district court, found that the physician who performs a D&E abortion follows each of these steps, and does so deliberately and intentionally, thereby violating the statute. *Carhart*, 192 F.2d at 1150; *see also Carhart v.*

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[1]This is not to say that the views of a state's attorney general carry no weight. For example, in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), this Court faulted the lower courts' refusal of an attorney general's request to certify to the state courts the question whether a constitutional requirement that the State "shall act in English and in no other language" reached all uses of any other language by an employee while performing official duties. *Id.* at 49, 75-79. Nothing in that case, however, justifies petitioners' reliance on it to establish a rule of federal judicial deference to an attorney general's interpretation of a statute. (Pet. Br. at 8, 12-13, 28). Nor would such a rule be workable, in that it could permit attorneys general to effectively displace legislatures and courts from their respective roles as authors and interpreters of state statutes.

Stenberg, 11 F. Supp. 2d 1099, 1127-31 (D. Neb. 1998). Thus, following the "plain and unambiguous meaning of the statutory language," *Albertini*, 472 U.S. at 680, the courts below concluded that the statute bans the D&E abortion procedure.[2]

Petitioners urge recourse to the legislative history of the statute (Pet. Br. at 22-23), but, as the district court's opinion demonstrates, that history does not provide the "extraordinary showing of contrary intentions" that is required by *Albertini*, 472 U.S. at 680. Rather, the district court found that "a review of the legislative history refutes the assertion that the legislature did not intend to

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[2]As the court below found, the term "partial-birth abortion," "though widely used by lawmakers and in the popular press, has no fixed medical or legal content." *Carhart*, 192 F.3d at 1145. Petitioners assert that the statutory intent is to ban only the D&X abortion procedure (also known as "intact dilation and evacuation") (Pet. Br. at 22-23), in which the body of the fetus is brought into the vagina while the head remains in the uterus, and the head is then reduced in size so it can be brought through the cervix. *Id.* at 1147. The court below held that, contrary to petitioners' assertion, the statute also bans D&E abortions. *Id.* at 1150. In the D&E procedure, the physician dilates the cervix and uses surgical instruments to remove fetal and placental tissue, a process that often involves dismemberment. *Id.* at 1146-47. The D&E procedure falls within the statutory definition of "partial-birth abortion" because "[t]he physician intentionally brings a substantial part of the fetus into the vagina, dismembers the fetus, leading to fetal demise, and completes the delivery." *Id.* at 1150.

ban the D&E." *Carhart*, 11 F. Supp. 2d at 1130.[3]

The Eighth Circuit recognized its "duty to give [the statute] a construction, if reasonably possible, that would avoid constitutional doubts." *Carhart*, 192 F.3d at 1150. Petitioners assert that the court below failed to fulfill this duty (Pet. for *Cert.*, Question 1; Pet. Br. at 24), relying on the discussion of statutory interpretation in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). This reliance, however, is misplaced. The Justices who joined that discussion in *Webster* (which did not represent the

[3]Both the district court and petitioners quoted remarks by the legislation's sponsor, Senator Maurstad. *See Carhart*, 11 F. Supp. 2d at 1131; Pet. Br. at 22-23. A comparison of the remarks supports the district court's conclusion that legislative intent does not provide a basis for narrowing the reach of the Nebraska statute, as urged by Virginia on behalf of several state *amici*. *See* Virginia Amicus Br. at 10-11. According to the district court:

> One simply cannot ascertain from the legislative history precisely what the legislature wanted to ban. We know the legislators wanted to ban "partial-birth" abortions, but that term is unknown in medical circles and it was poorly understood, if at all, by the legislature.

Carhart, 11 F. Supp. 2d at 1130-31.

Excerpts of the floor debate further support this determination. (*See, e.g.*, Joint Appendix 380-82) (sponsor's statement that substitution of the term "intact dilation and extraction" for the term "partial birth abortion" would change what the bill was designed to do).

view of a majority of the Court[4]) found that the statutory provision at issue, when read in the context of the paragraph where it appeared, made sense only if interpreted in a manner that was consistent with both the Constitution *and* the rest of the paragraph. *Id.* at 513-15. That result has no bearing on the situation here, in which petitioners' proffered construction could be reached only if this Court were to replace the very words of the statute with other words that purportedly more accurately reflect the legislative intent. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) ("Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [a statute] was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts.").

As this Court wrote in *Albertini*, the requirement that courts follow the plain meaning of the statutory language "is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Albertini*, 472 U.S. at 680. Indeed, courts "will not rewrite a state

[4]The discussion of statutory interpretation appears in Part II-D of the opinion, *Webster*, 492 U.S. at 513-15. Chief Justice Rehnquist's opinion in Part II-D was joined by Justices White and Kennedy, *id.* at 498, and Justice O'Connor joined its reasoning on the pertinent issue here, *id.* at 527. The fifth vote for the judgment reached in Part II-D was supplied by Justice Scalia, but he "strongly dissent[ed] from the manner in which it [was] reached," *id.* at 537.

law to conform it to constitutional requirements." *American Booksellers*, 484 U.S. at 397. The statute at issue "must be 'readily susceptible' to the limitation." *Id.*; *accord, Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997). This is the canon of statutory construction that the Eighth Circuit applied in stating that it could not "twist the words of the law and give them a meaning they cannot reasonably bear." *Carhart*, 192 F.3d at 1150. Because the terms of the statute banned D&E abortions and thus unconstitutionally burdened the right to choose, the Eighth Circuit correctly struck it down.

B. The Approach to Statutory Construction Urged by Petitioners Is Contrary to State Interests

While *amici*, as states, generally favor methods of statutory construction that uphold state statutes, we cannot endorse the approach, used by the Seventh Circuit in *Hope Clinic*, 195 F.3d at 869, to uphold the Wisconsin and Illinois abortion bans challenged therein, and advocated by petitioners in construing the Nebraska statute.

The Seventh Circuit at the outset acknowledged that the language of the Illinois and Wisconsin abortion bans could be understood by "lay eyes" and by "risk-averse physicians" to bar D&E abortions. *Hope Clinic*, 195 F.3d at 863-64. That court also acknowledged (in *dictum*) that if the statutes did bar the D&E procedure, they would impose an "undue burden" on abortion and

therefore would be unconstitutional. *Id.* at 871. However, the court did not actually hold the statutes unconstitutional. Instead, relying on representations by the Illinois and Wisconsin Attorneys General that their respective legislatures intended the statutes to reach only D&X abortions, the circuit directed the lower courts to enter "precautionary injunctions" against applying the statutes to other than those procedures. *Id.* at 869. The injunctions required by *Hope Clinic* are to apply until the states provide "additional specificity" about the statutes. *Id.*[5]

By this means, the federal court enjoined certain interpretations of state statutes without holding that the statutes violated the Constitution. The Seventh Circuit forthrightly acknowledged this feature of its ruling. *See id.* at 869 ("A skeptic might respond: what's the basis for an injunction without a finding of actual constitutional violation?"). This candor, while admirable, does not excuse the circuit's failure to abide by a basic limitation on federal court power: where "there is no continuing violation of federal law to enjoin . . . an injunction is not available." *Green v. Mansour*, 474 U.S. 64, 71 (1985).

The Seventh Circuit presented its use of the heretofore-unprecedented vehicle of a federal "precautionary injunction" regarding interpretation of

[5]The court implicitly acknowledged that its remedy may not eliminate the statutes' acknowledged vagueness, stating that even with the "precautionary injunctions" in place, there still may be "criminal prosecutions in which the parties disagree about whether the medical procedure properly may be labeled a D&X." *Hope Clinic*, 195 F.3d at 869.

state law as a natural outgrowth of the principle that federal courts owe deference to state court interpretations of state statutes. *See Hope Clinic*, 195 F.3d at 864-69. Specifically, the Seventh Circuit purported to rely on *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976), for the proposition that "Article III does not limit a federal court's choice to enjoining nothing, or enjoining everything. The path we choose allows the states to interpret their laws and supply more concrete rules." *Hope Clinic*, 195 F.3d at 869-70.

In *Baird*, however, this Court held that abstention with certification to the state court -- not a "precautionary injunction" -- is the appropriate procedure where an unconstrued state statute is susceptible of a construction by the state judiciary that could avoid or alter the constitutional issues. *Baird*, 428 U.S. at 146-47.[6] Thus,

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[6]This, however, does not appear to be an appropriate case for certification to the Nebraska Supreme Court. It is unclear whether petitioners, in the proceedings below, ever sought certification of any question to the state court. Neither opinion below discusses any request for certification, and petitioners' brief refers only to a request for "abstention." (*See* Pet. Br. at 25 n.10). In any event, the standards for certification, as enunciated in *American Booksellers*, 484 U.S. at 395, are not met here. In that case, the Court acknowledged that it "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Id.* (citation omitted). The statute there at issue presented the "rare situation in which [the Court could not] rely on the construction and findings below," because there was "no reliable evidence in the record supporting" the district court's analysis of the reach of the statute. *Id.* Here, by contrast, the district court recited at length the evidentiary support for its holding that the abortion ban

(continued...)

where the Seventh Circuit invoked deference, in fact it engaged in federal judicial activism of the most naked sort.

As states, this approach gives us pause. Most importantly, as the *Hope Clinic* dissenters pointed out, such "precautionary injunctions" "will forbid the enforcement of the statutes outside their core prohibition, thus placing the federal contempt power behind this court's interpretation of state statutes." *Hope Clinic*, 195 F.3d at 876 (Posner, C.J., dissenting). This approach "implies a radical expansion of the power of the federal courts to superintend the enforcement of state statutes. State officials will be subject to federal contempt sanctions for failing to abide by a federal court's interpretation of the statutes that these officials, not federal judges, are charged with administering." *Id.* While in *Hope Clinic* the federal court adopted the statutory interpretation proffered by at least some state officials, nothing in the *Hope Clinic* majority's reasoning confines issuance of "precautionary injunctions" to situations in which relevant state officials agree with the federal court. The future application of this approach is daunting to imagine, as state officials may face contempt charges for enforcing statutes that have not been held invalid.

Nor does the Seventh Circuit's approach serve its stated purpose of allowing states to determine the

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[6](...continued)
reached D&E abortions, and the Eighth Circuit affirmed the district court's analysis in light of the trial evidence. *Carhart*, 11 F. Supp. 2d at 1127-29; *Carhart*, 192 F.3d at 1150.

contours of their laws. The majority styled the "precautionary injunctions" to be issued by the district courts as temporary, stating that the injunctions are "limited to implementing the conclusion of this paragraph that the state laws may not be applied to a normal D&E or induction until after the state has provided additional specificity, by statutory amendment, regulations, or judicial interpretation." *Id.* at 869. However, because they prohibit certain statutory applications, the "precautionary injunctions" may actually prevent cases requiring interpretation of these statutes from ever reaching state courts. *Id.* at 877 (Posner, C.J., dissenting).

This Court, using the language of separation of powers, has cautioned against permitting courts to rewrite federal statutes, because "[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress." *Albertini*, 472 U.S. at 680. Here, where a federal court is interpreting a state statute, respect for federalism particularly demands rejection of an approach to statutory construction that, "while purporting to be an exercise in judicial restraint," actually would insert federal courts into interpretation of state statutes in new and untested ways.

II. THIS COURT'S PRECEDENTS REQUIRE REJECTION OF AN ABORTION BAN THAT NEITHER PROTECTS WOMEN'S HEALTH NOR PROTECTS POTENTIAL LIFE

A. The Nebraska Ban Must Be Rejected Because It Does Not Serve Either of the State Interests that Justify Abortion Restrictions

Since *Roe v. Wade*, 410 U.S. 113 (1973), the first principle of this Court's abortion decisions has been that the Constitution protects a woman's fundamental right to decide whether to terminate her pregnancy before fetal viability. *Id.* at 153-54. In the years since *Roe*, even as this Court has approved a variety of restrictions on abortion, it has repeatedly reaffirmed this underlying right, most recently stating in unequivocal terms: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992).

Also since *Roe*, this Court has recognized that "this right is not unqualified and must be considered against important state interests in regulation." *Roe*, 410 U.S. at 154. In its decisions, the Court consistently has identified two state interests that are weighty enough to justify abortion regulation: "preserving and protecting the health of the pregnant woman" and "protecting the potentiality of human life." *Id.* at 162; *accord City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 427-29 (1983),

overruled in part on other grounds, *Casey*, 505 U.S. at 881-84. At the outset of the *Casey* decision, this Court again reiterated that the state interests that are sufficient to justify an abortion regulation are protecting women's health and protecting potential life. *Casey*, 505 U.S. at 846. The decision highlighted the principle that abortion cases involve balancing these two state interests against the woman's constitutional rights: it described the "interest of the State in the protection of potential life" as being on "the other side of the equation" from "[t]he woman's right to terminate her pregnancy before viability." *Id.* at 871. Moreover, abortion regulations must be "tailored to the recognized state interests" that they are intended to serve. *Roe*, 410 U.S. at 165; *Akron*, 462 U.S. at 434 (requiring regulation to be "reasonably designed to further" asserted state interest).[7]

The abortion ban at issue in this case does not serve either of these state interests. Petitioners make no claim that this statute was enacted to protect pregnant women's health. To the contrary, as petitioners acknowledge, the statute does not permit the targeted abortion procedures even if, in the physician's judgment, they are needed to protect a woman's health. (Pet. Br. at

[7]A third state interest described in *Roe*, in "maintaining medical standards," *Roe*, 410 U.S. at 154, is in practical terms essentially the same as the state interest in protecting women's health, *id.* at 149-50. It has not been treated by this Court in subsequent cases as a third or distinct substantial state interest. *See, e.g.*, *Akron*, 462 U.S. at 428-29 (interest in maintaining medical standards is grounded in state's "legitimate concern with the health of women who undergo abortions").

30). Nor does the Nebraska statute promote potential life, because, in petitioners' analysis, it leaves the woman free to terminate her pregnancy by another abortion procedure. (Pet. Br. at 36). Thus, the Nebraska ban does not serve either of the state interests that this Court has recognized as sufficient to justify limitations on abortion.

Implicitly recognizing that its abortion ban does not serve either of these recognized interests, petitioners assert that the ban is nonetheless justified by an interest in "protecting or at least showing concern for a child in an induced birth process," and in "erecting a barrier to infanticide." (Pet. Br. at 49). These asserted interests, however, cannot justify a statute regulating abortion before viability.

Petitioners' reference to "showing concern for a child in an induced birth process" is disingenuous. There is no "induced birth process" at issue here; D&E and D&X are methods of abortion, the indisputable purpose of which is to kill the fetus, not to bring about a live birth. The premise that a fetus that is "more outside the womb than inside [is] . . . . no longer 'unborn,'" and that therefore, a D&X abortion "blurs the distinction between abortion and infanticide" (Pet. Br. at 49) is likewise illogical, because the only reason that the fetus is "outside the womb" is that it is being aborted. The attempt to characterize as "infanticide" an abortion being performed inside a woman's body involving a fetus before viability is flatly incompatible with the right to terminate pregnancy before viability that this Court so recently reaffirmed. *See Casey*, 505 U.S. at 871.

Alternatively, petitioners would expand the state's

recognized interest in potential life to include an "interest in preventing cruelty to partially-born children."[8] (Pet. Br. at 48). Again, in the context of abortion before viability, this attempt misconstrues the nature of the recognized interest in potential life: as detailed in the *Casey* decision, states legitimately may undertake efforts to "persuade [the woman] to choose childbirth over abortion," so long as those efforts do not unduly burden the right to choose abortion. *Casey*, 505 U.S. at 878. However, once the woman has chosen an abortion -- and is in the process of having the abortion -- neither *Casey* nor any other decision permits a state to attempt to prevent "cruelty" to the fetus.

B. As the Nebraska Ban Demonstrates, Permitting Abortion Restrictions that Do Not Serve these Recognized State Interests Would Risk Women's Liberty and Health

A decision by this Court that would exempt legislatures from the requirement that they tailor abortion regulations to the recognized state interests in protecting women's health or promoting potential life would seriously endanger the liberty and health interests that are at the core of the decisions in *Roe* and *Casey*.

First, such a decision would devalue the liberty interest that, as this Court so forthrightly recognized in

[8]Petitioners erroneously use the phrase "partially-born child" to refer to a fetus that is wholly inside the woman's body and is in the process of being aborted.

Casey, is central to women's lives. The *Casey* Court reinforced the "urgent claims of the woman to retain the ultimate control over her destiny and her body [as] implicit in the meaning of liberty," 505 U.S. at 869, and further acknowledged that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *id.* at 856. The Court rejected, *id.* at 845, the dissenters' view that a rational relationship to any "legitimate state interest," *id.* at 966, could support abortion regulation. Instead, it is the state's "*substantial interest in potential life* [that] leads to the conclusion that not all regulations [of abortion] must be deemed unwarranted." *Id.* at 876 (emphasis added). To hold now that *any* asserted state interest may be a sufficient basis for restricting previability abortion would necessarily reduce the weight accorded to the woman's liberty interest, a result that cannot be reconciled with either *Casey* or *Roe*.

Second, such a decision would invite enactment of all manner of abortion restrictions. Even though the legality of such restrictions could be tested against *Casey*'s "undue burden" standard, they could otherwise serve any state interest, or even no state interest. Legislative ingenuity would be their only practical limitation, and the predictable result would be to mire legislatures and the courts in endless battles over abortion regulations while adding to rather than reducing uncertainty over this core constitutional right and the safety of women seeking to exercise it.

The statute at issue demonstrates the dangers of

this course: in an effort to serve other goals, the State of Nebraska has lost sight of its obligation to create an exception for circumstances when a prohibited procedure is needed to protect the pregnant woman's health. Rather, the only exception to the Nebraska ban is when the "partial-birth abortion . . . is necessary to save" the woman's life. Neb. Rev. Stat. § 28-328(1).

This failure to create a health exception to the "partial-birth abortion" ban severely undermines its constitutionality. Petitioners justify this failure on the ground that the D&X abortion procedure is "not medically *necessary*, and safe alternative methods of abortion are available." (Pet. Br. at 30) (emphasis added). Petitioners cite the Seventh Circuit's decision, upholding similar statutes, which relied on a district court's conclusion that the D&X procedure is "never medically *necessary* to save the life or preserve the health of a woman." (Pet. Br. at 30) (citing *Hope Clinic*, 195 F.3d at 872) (emphasis added).

This Court has already held, however, that when a state wishes to ban an abortion procedure, it cannot use medical *necessity* as the only exemption from the ban, because the standard of necessity does not permit "all factors relevant to the welfare of the woman [to] be taken into account by the physician in making his decision." *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).[9] Rather, a

[9]Under the Pennsylvania statutory provision struck down in *Colautti*, when a doctor performing an abortion believed that the fetus was or might be viable, the doctor was required to use the abortion method most likely to result in a live birth "so long as a different technique would not be necessary in order to preserve the life or (continued...)

statute is unconstitutional if it "require[s] a 'trade-off' between the woman's health and fetal survival, and fail[s] to require that maternal health be the physician's paramount consideration." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986), *overruled in part on other grounds, Casey*, 505 U.S. at 881-84. According to this Court, a state may not require women to submit to abortion procedures that bear *any* increased medical risk over available alternatives, even when the requirement's purpose is to promote the survival of a *viable* fetus. *Thornburgh*, 476 U.S. at 769. If states cannot mandate abortion procedures that may be detrimental to women's health even to promote the state's interest in the life of a viable fetus, they surely cannot ban an abortion procedure that in particular medical circumstances may best preserve a woman's health -- even if the procedure is not absolutely "necessary" -- when the ban promotes *no* state interest.[10] A contrary determination would sacrifice improvements in the safety of abortion to any state interest that might be asserted.

The *Casey* decision strove in part to reestablish the fundamental principles of *Roe v. Wade*, recognizing the

[9](...continued)
health of the mother." *Colautti*, 439 U.S. at 380, n.1.

[10]The district court credited medical testimony that in some circumstances the D&X procedure is safer than other abortion methods. *Carhart*, 11 F. Supp. 2d at 1107-08, 1124-27; *see also Hope Clinic*, 195 F.3d at 883-84 (Posner, C.J., dissenting) (quoting statement of American College of Obstetricians and Gynecologists).

"central right" of the woman to "mak[e] the ultimate decision to terminate her pregnancy before viability," while "accommodating the State's profound interest in potential life" and its ability to "enact regulations to further the health or safety of a woman seeking an abortion." *Casey*, 505 U.S. at 878-89. "State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." *Id.* at 845. By applying these principles to invalidate the Nebraska statute -- and particularly, by reiterating that the woman's profound liberty interest in the abortion decision may be balanced only by equally profound state interests -- this Court will provide the necessary guidance to states while safeguarding the liberty and health of women.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
PREETA D. BANSAL
Solicitor General
Counsel of Record
JENNIFER K. BROWN
Assistant Attorney General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020
Attorneys for the
State of New York